National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: July 6, 1998

TO: Daniel Silverman, Regional Director, Region 2

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Consortium for Worker Education, Case 2-CA-27751

240-3367-5057

This case was submitted for advice on whether deferral to an arbitration award upholding the discharge of an employee for insubordination is warranted under Spielberg-Olin.[(1)]

The Employer provides teachers for classes organized by unions for their members. The Employer's teachers, including Charging Party Noyes, are represented by UFT which has a bargaining agreement with the Employer. In early 1994, OPEIU Local 153 contracted for the Employer to provide an ESL (English as a Second Language) class to its members. The Employer assigned Noyes to teach that ESL class.

Several students in that class were home health care workers who expressed to Noyes their dissatisfaction with their working conditions, and also with Local 153's failure to address the problem. Noyes decided to use Local 153's own materials to teach the class and asked that union for copies of its bargaining agreements and membership information. Local 153 denied the request and told Noyes that it preferred to separate union issues from its ESL classes. Noyes eventually used other materials for his class. Several class students later asked Noyes how they could learn more about their rights and benefits under Local 153's bargaining agreement. Noyes gave these students the phone numbers of the Association of Union Democracy and the Latino Workers Center. When the class ended in mid-June 1994, the Employer told Noyes he would be assigned no further Local 153 classes and instead assigned him a class for Local 1199.

In July, Noyes attended two meetings held by dissident members of Local 153. The dissidents discussed their dissatisfaction with both their working conditions and also their representation by Local 153, and also involved a potential wildcat strike. Noyes offered to help the dissidents in any way they could. Around this time, Local 153 complained to the Employer that Noyes was involved with a group of Local 153 dissidents in a bargaining dispute between Local 153 and their employer. Local 153 requested that the Employer discharge Noyes. On July 29, the Employer summoned Noyes to a meeting to discuss his activities with Local 153. The quickly ceased when Noyes requested UFT representation.

On August 8, a group of Local 153 dissidents held a wildcat strike and demonstration in front of their employer. Some of these dissidents were discharged for having violated the contractual no-strike clause. On August 16, Noyes attended a regular membership meeting of Local 153. When a Local 153 representative asked Noyes about his presence, Noyes stated that he was there at the request of some Local 153 members and to support the home health care workers.

On August 26, Noyes attended a workshop held by a group of Local 153 dissidents who were calling themselves the "Trabajadores Unidos." The workshop was called "What is a Union" and was attended by six individuals. The following day, The Employer suspended Noyes for "activities with the members of OPEIU which are deemed as interference in the internal affairs of one of the [Employer's customers]." At a meeting on August 30 between the Employer and Noyes, the Employer attempted to explain its policy against its teacher-employee's dealing with anything of a political nature in the classroom. The Employer stated that Noyes attendance at meetings with Local 153 members embarrassed its relations with Local 153; that Local 153 was seeking Noyes' discharge; and that Local 1199 wanted him reassigned from its class. Noyes responded that he had been previously unaware of any Employer policy against meeting with Local 153 members and, in any event, he intended to do whatever he chose on his own free time. At that juncture, the Employer converted Noyes' suspension into a discharge.

At a third-step grievance meeting on September 29, 1994, the Employer offered to reinstate Noyes if he would agree to abide by the Employer's policy of non-interference with customers. Noyes refused to agree. The parties arbitrated Noyes' discharge and, on March 4, 1997, the arbitrator sustained the discharge.

The arbitrator first decided that the Employer's non-interference policy had not been in effect prior to Noyes' discharge on August 30 and that Noyes therefore was not responsible for his activities in contravention of that policy prior to that date. The arbitrator decided that the scope of the non-interference policy was effectively established by the Employer's reference to Noyes' activities preceding his discharge. The arbitrator found that Noyes had been insubordinate and disloyal in assisting the Trajabadores Unidos. The arbitrator noted, inter alia, that that Noyes was involved with the dissidents' attempt to negotiate directly with the employer usurping Local 153's representative status, with the August 8 wildcat strike and subsequent loss of jobs, and that Noyes did not credibly deny that he knew or should have known about an unlawful strike. The arbitrator sustained the August 30 discharge because Noyes refusal to agree to refrain from similar activities interfering with the contractual disputes of the Employer's customers.[(2)]

We conclude, in agreement with the Region, that it should dismiss the charge in deference to the arbitrator's award because it is not repugnant to the Act.

The Region has already determined that the other criteria under Olin have been met, viz., the arbitration was fair and regular; all parties agreed to be bound; and the arbitrator was presented with and considered the facts relevant to the instant allegation. The only remaining issue is whether the award is repugnant to the purposes and polices of the Act, because it arguably requires Noyes to choose between either keeping his job or exercising his Section 7 right to assist union members in their internal union activity. In this regard, the Board will find that an award merits deference unless it is "palpably wrong", i.e., is not susceptible of an interpretation consistent with the Act. The Board does not require that an arbitrator's award be totally consistent with Board precedent, and will defer to an award that is consistent with the Act even if the Board, in de novo review, would have decided the issue differently.[(3)] The Board places the burden of showing a repugnant result unworthy of deference upon the party seeking to have the Board reject the award and decide the merits.

In the instant case, Noyes contends that he engaged in clearly protected activity with the Local 153 dissidents.[(4)] Noyes however also engaged in clearly unprotected activity.[(5)] In any event, even the protected dissident activity engaged in by the Local 153 dissidents here arguably was not protected for Noyes himself because it constituted disloyalty to his Employer.

It is well settled that certain "disloyal" employee activities designed to injure their employer's business will be found to be without protection of the Act. In Jefferson Standard Broadcasting,[(6)] the Supreme Court held that employee conduct involving disparagement of an employer's product, rather than publicizing a labor dispute, was disloyal and thus unprotected. Id. at 472, 477. In that case, the employees had distributed a handbill accusing their employer, a broadcasting company, of depriving the public by furnishing technically inadequate, "second class" television service. Although the handbill was distributed as part of an effort to exert pressure on the employer in an ongoing labor dispute, it made no reference to the union or to the underlying labor dispute which gave rise to the employees' allegations.

Similarly, employees who compete with their employer or try to deprive their employer of a portion of its business in order to improve their own working conditions are considered to be engaged in unprotected, disloyal activity. In Associated Advertising Specialists,[(7)] the Board affirmed an ALJ's finding that the employer did not violate the Act when it discharged an employee for submitting a personal bid for work to one of the employer's biggest customers. The discharge was thus valid even though it occurred in the context of an organizing campaign and during a period when the employee was laid-off.[(8)]

In the instant case, the Employer has established that Noyes' involvement with the internal politics of the Employer's customers seriously undermined the Employer's business by disparaging the product (i.e., employee representation) of the Employer's customers. In addition, Noyes' involvement did not concern any dispute between Noyes or his own representative, the UFT, and the Employer. Thus here, as in Jefferson Standard Broadcasting, Noyes' activity, bereft of any connection with his own employment, at least arguably was simply disloyal. Since this conclusion is consistent with the purposes and policies of the Act, the arbitrator's award is not repugnant and is worthy of deference.

B.J.K.

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[1] Speilberg Mfg. Co., 112 NLRB 1080 (1955) and Olin Corp., 268 NLRB 573 (1984).

[2] The arbitrator noted that Noyes had been placed on notice by Local 153 itself that it wanted to keep separate its ESL class and internal union issues. The Employer also had alerted Noyes to potential problems with his involvement with Local 153 members, both at the aborted July 29 meeting, and in its suspension letter. Thus the arbitrator rejected Noyes' contention that the Employer's August 30 directive lacked specificity, and instead found that the Employer "demanded that [Noyes] refrain from clearly defined activities including attending meetings with dissidents of Local 153 (and other member unions) and involving himself in contractual disputes of affiliate unions."

[3] See, e.g., Louis G. Freeman Co., 270 NLRB 80 (1984)

[4] Where a union has adopted a policy, its members are engaged in protected activity when disagreeing with and seeking to change it. See, e.g., Distillery Workers Local 186 (E & L Gallo Winery), 296 NLRB 519, 524 (1989); Durham Transportation, 317 NLRB 785, 786, note 4 (1995).

[5] Disobedience or defiance of union policy may subject members to lawful discipline, see, e.g., Distillery Workers Local 186, supra, and/or may subject them to lawful employer discipline. See, e.g., Energy Coal Partnership, 269 NLRB 770 (1984)(wildcat strike); Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 72 (1975).

[6] Jefferson Standard Broadcasting Co., 346 U.S. 464 (1951).

[7] 232 NLRB 50 (1977).

[8] See also Kenai Helicopters, 235 NLRB 931, 934-936 (1978) (discharge lawful where employer reasonably believed that employees planned to use a strike to divert employer's business to a competitor whom they were going to join).